COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
No. SJC-13218

_____

BASK, INC.,
Plaintiff-Appellee
vs.
MEMBERS OF THE TAUNTON CITY COUNCIL,
Defendant-Appellants

_____

ON APPEAL FROM THE JUDGMENT OF THE
MASSACHUSETTS LAND COURT

_____

BRIEF OF AMICI CURIAE

THE REAL ESTATE BAR ASSOCIATION FOR MASSACHUSETTS, INC.
AND THE ABSTRACT CLUB
IN SUPPORT OF PLAINTIFF-APPELLEE

_____

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March 25, 2022

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Judicial Court Rule 1:21, the amici curiae state that (1) the Real Estate Bar Association for Massachusetts, Inc. ("REBA"), is a nonprofit corporation organized under the laws of the Commonwealth of Massachusetts, and (2) The Abstract Club is an unincorporated, voluntary association (collectively, the "Amici"). No publicly traded corporation owns more than 10% of the stock of either of the Amici.

DECLARATION REGARDING PREPARATION OF AMICI BRIEF

In accordance with Rule 17(c)(5) of the Rules of Appellate Procedure, the Amici declare that the undersigned counsel authored the brief, and that no party or party's counsel authored it in whole or in part. The Amici also declare that no outside party, person, or entity contributed money intended to fund preparation or submission of this brief.

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STATEMENT OF INTERESTS OF AMICI CURIAE

REBA is the largest specialty bar in the Commonwealth, a non-profit corporation that has been in existence for over 100 years. It has nearly 2,000 members practicing throughout the Commonwealth. Through its meetings, educational programs, publications, and committees, REBA assists its members in remaining current with developments in the field of real estate law and practice, and in sharing in the effort to improve that practice. REBA also promulgates title standards, practice standards, ethical standards, and real estate forms, providing authoritative guidance to its members and the real estate bar generally as to the application of statutes, cases, and established legal principles to a wide variety of circumstances that practitioners face in evaluating titles, handling real estate transactions, seeking land-use permits before local boards, and litigating real estate disputes in court.

The Abstract Club is a voluntary association of experienced real estate law lawyers. Founded over 150 years ago, with membership limited by its by-laws to

100 members, it is comprised of lawyers who are considered leaders in the field of real estate law.

REBA and the Abstract Club have formed a Joint Amicus Committee, a joint committee of the two organizations comprised of real estate lawyers with many years of experience. From time to time, the Joint Amicus Committee files amicus briefs on important questions of law. On several occasions it has been requested to do so by this Court or the Appeals Court. All Committee members serve without compensation.

Members of both REBA and The Abstract Club represent project proponents and abutters alike before local boards and in the courts of this Commonwealth. Given their members' experience, knowledge, and expertise in the field of real estate, particularly zoning and land use regulatory law, the Amici and their members occupy a unique vantage point and can attest, with particular authority, to the importance of doctrinal consistency on the issue presented in this appeal.

More specifically, one implication of the Single Justice's December 21, 2020 Notice of Docket Entry is that, because the Land Court is not a court of general

jurisdiction, its ability to fashion remedies in a zoning appeal differ from that of the Superior Court. The Amici and their members have a special interest in ensuring that the scope of relief that may be granted pursuant to G.L. c. 40A, §17 is full and complete, and that when zoning appeals are taken to the Land Court, as authorized by the Zoning Act, that the Land Court has the full panoply of equitable remedies at its disposal.

There are reasons why a §17 litigant might choose to file suit in the Land Court, rather than the Superior Court, including single-judge assignment, state-wide jurisdiction, active case management, and a bench that is specialized in the relevant area of substantive law, which can be esoteric. Each citizen possesses the full and free right to petition the courts for redress, as enshrined in the Massachusetts Declaration of Rights. *See* MASS. CONST. arts. 11 & 29. Honoring these constitutional commitments, the Amici's members' clients should not, and cannot, be forced to choose between these potential benefits of filing in the Land Court, and the ability to obtain a full and complete remedy. For this reason and those developed

below, the scope of permissible relief, pursuant to §17 to "make such other decree as justice and equity may require," must be the same when issued by the Land Court as by the Superior Court. And such relief must be allowed to extend into adjacent and related regulatory proceedings, when those proceedings reasonably threaten to nullify and/or deprive a decree entered by the Land Court under G.L. c. 40A, §17, of practical force and effect.

STATEMENT OF THE CASE

The Amici adopt the Statement of the Case provided by the Plaintiff-Appellee in their brief.

STATEMENT OF FACTS

The Amici adopt the Statement of Facts provided by the Plaintiff-Appellee in their brief.

SUMMARY OF ARGUMENT

The Zoning Act grants courts broad powers to hear and decide appeals from local zoning decisions, to annul local decisions, and to "make such other decree as justice and equity may require." G.L. c. 40A, §17. The contours of the statutory charge to employ equitable remedies have been examined by decades of case law, and without question include the ability to

order local boards to grant permits, to remand matters prior to trial, to order a remand hearing to occur by a certain date, and to impose procedural and substantive conditions on post-judgment municipal proceedings. *See infra*, pp. 14-17.

In particular, where there are more applicants than available permits, as in Taunton, courts under §17 will make appropriate decrees to ensure that no party is unfairly prejudiced by improper municipal conduct that advantages one applicant at the expense of another. *See infra*, pp. 18-20. Because "equity will not suffer a wrong to be without a remedy," the scope of equitable remedies available to courts is broad, and the remedies themselves must be flexible rather than rigid to do justice based on the specific facts before the court. *See infra*, pp. 20-22.

Here, where the defendant/appellant Taunton City Council sits as both the special permit granting authority under Taunton's zoning ordinance, and the municipal licensing authority under the general city ordinances, there should be no question that the City Council is under the Land Court's jurisdiction. *See infra*, pp. 22-24. But either way, it is established

that a municipality may not use a general police power to thwart a limitation on its zoning power, and courts will render equitable judgments to prevent that from happening, even when there is no zoning appeal properly in front of it. *See infra*, pp. 24-26.

In this case, the Land Court acted within the authority granted to it by §17. If the Land Court had not issued some preliminary injunctive relief, there was a real risk that the plaintiff/appellee, Bask, Inc., would have suffered a wrong (improper denial of a zoning permit) without a remedy. This is because the city of Taunton had established a process where the zoning permit was a prerequisite to a second municipal license, for which there were more applicants than licenses. If the municipal licensing process was allowed to proceed without Bask's involvement, then even if the special permit denial ultimately was overturned (as happened), the municipal licensing process would have proceeded without Bask, and Bask would have been left behind with a hollow victory in its zoning appeal. *See infra*, pp. 26-30.

ARGUMENT

The statutory authority granted to courts by the Zoning Act to annul local decisions and to "make such other decree as justice and equity may require" is an important check against municipal overreach. Here, Taunton has enacted a system with three critical components. First, the City Council is the special permit granting authority for marijuana uses under its zoning ordinance (Chapter 440 of the city's Ordinances), but is also the licensing authority for marijuana uses under its general ordinance (Chapter 222 of the Ordinances). Second, the total number of marijuana licenses is capped at a set number. *See* Ord. §220-1(E). Third, the City Council will not consider an application for a municipal license until the zoning permit has issued.

Thus, an applicant needs two approvals from the same entity to operate a marijuana business, and one is a prerequisite to the other. As a result, if the City Council were to improperly deny a special permit to an applicant——as Bask claimed happened, and as the Land Court determined after trial——then absent an injunction, by the time the disappointed applicant

gets through the courts on its appeal, it will likely be too late. The city would have met its license cap, the improper denial would be converted to an effective and final denial, and the applicant would be essentially without remedy.

This is the landscape that the Land Court judge encountered. The question presented to the Amici is essentially whether the Land Court was powerless to do anything about this outcome. For the reasons set forth herein, this Court should hold that (a) the Land Court, in a pending zoning appeal, has the authority to enjoin a municipal licensing authority as necessary to protect the interests of a plaintiff; and (b) pursuant to G.L. c. 40A, §17, the Land Court, to give meaning and effect to a decision in a zoning appeal and to protect the interests of the prevailing litigant, has the authority to order a municipal licensing authority to consider a particular license application at a particular licensing hearing.

I. Courts Hearing Zoning Appeals Have Statutory Authority Beyond Annulling Local Decisions.

This case does not properly present a question regarding the limits of the Land Court's general jurisdiction under G.L. c. 185, §1(k). Rather, the

inquiry should be into the Land Court's explicit statutory authority to hear and decide zoning appeals, and in those cases, the power to annul decisions of municipal boards, and to "make such other decree as justice and equity may require." *See* G.L. c. 40A, §17, G.L. c. 185, §1(p).

A. The Zoning Act Grants Courts Broad Authority to Fashion Appropriate Remedies.

This statutory term (to make decrees "as justice and equity may require") confers authority on trial judges hearing zoning appeals to issue decrees ordering the issuance of the denied zoning relief, either by remand or directly, rather than ordering remands to local boards for reconsideration. *See Shirley Wayside Ltd. P'ship v. Board of Appeals of Shirley*, 461 Mass. 469, 474, 485 (2012); *Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Board of Appeal of Billerica*, 454 Mass. 374, 387-389 (2009); *Cape Ann Land Dev. Corp. v. City Council of Gloucester*, 374 Mass. 825, 826 (1978); *MacGibbon v. Board of Appeals of Duxbury*, 369 Mass. 512, 520 (1976); *Lapenas v. Zoning Bd. of Appeals of Brockton*, 352 Mass. 530, 533-534 (1967); *Mahoney v. Board of Appeals of Winchester*,

344 Mass. 598, 601-602 (1962); *Pendergast v. Board of Appeals of Barnstable*, 331 Mass. 555, 559 (1954); *Chamberland v. Selectmen of Middleborough*, 328 Mass. 628, 633 (1952); *D'Ambra v. Zoning Bd. of Appeal of Attleboro*, 324 Mass. 61, 61, 63 (1949); *Crittenton Hastings House of Florence Crittenton League v. Board of Appeal of Boston*, 25 Mass. App. Ct. 704, 715 (1988); *Newbury Junior College v. Brookline*, 19 Mass. App. Ct. 197, 208 (1985); *Roberts-Haverhill Assocs. v. City Council of Haverhill*, 2 Mass. App. Ct. 715, 717-719 (1974).

This includes the authority to remand a matter prior to trial, as in *Mancuso v. Marblehead Zoning Bd. of Appeals*, 99 Mass. App. Ct. 1107, 2021 WL 190752 at *2 (2021) (Rule 23), to order that a hearing on remand occur on or before a specific date, *see id.*, and the ability to impose procedural and substantive requirements on subsequent (post-judgment) municipal proceedings. *See Clear Channel Outdoor, Inc. v. Zoning Bd. of Appeals of Salisbury*, 94 Mass. App. Ct. 594, 601 (2018) (directing board to hold further proceedings "in such manner as not to defeat" the two-

step, municipal-State process contemplated by the Legislature.

B. Binding Authority Already Contemplates that Courts Will Direct the Manner and Timing of Subsequent Municipal Action.

The facts in *Clear Channel Outdoor, Inc. v. Zoning Board of Appeals of Salisbury*, 94 Mass. App. Ct. 594 (2018), are similar to the case at bar in a few important ways. First, just like Taunton requires 500 feet separation between marijuana retailers (Ord. §440-604), state regulations prohibit two digital billboards within 1,000 feet of each other. *See id.* at 595. In *Clear Channel*, two billboard companies applied at the same time for a special permit from the Salisbury zoning board for a digital billboard on properties within 1,000 feet of each other. *See id.* Like the case at bar, the zoning permit was only the first of two permits needed. *See id.* In Taunton, the second permit was the municipal permit under Chapter 222 of the Ordinances; in *Clear Channel* the second permit was an approval by a state agency, the Office of Outdoor Advertising (the "OOA"). *See id.* In both cases, the second permit ultimately decided who would be able to operate (in *Clear Channel* the OOA could

approve only one billboard even if both obtained special permits; similarly here, the City Council could award the municipal license to a maximum of eight applicants, even if more applicants obtained zoning approvals). Ord. §222-1[E]).

In *Clear Channel*, the zoning board approved one application for a special permit and denied the other. *See* 94 Mass. App. Ct. at 595-96. The disappointed applicant appealed and the Appeals Court (reversing the trial court) ordered that a new judgment be entered "(a) annulling the decision of the board allowing Northvision's special permit application, (b) annulling the decision of the board denying Clear Channel's special permit application, and (c) directing the board to hold such further proceedings as may be necessary on the two applications, conducted in such manner as not to defeat the two-step, municipal-State process contemplated by the Legislature." *Clear Channel, supra* at 601. The modifier "conducted in such manner as not to defeat the two-step, municipal-State process contemplated by the Legislature" limited the ability of the Salisbury board of appeals to proceed in two significant ways.

First, as a practical matter, it required the board to hear the two competing billboard applications simultaneously, so that neither applicant would get a head start by getting to the OOA first.[1] Second, it contained an implicit admonishment to evaluate the two applications on their own merits, and without regard to the fact that some other agency (the OOA) would have the ultimate say as to which of the two would proceed. In other words, if both billboard proposals were to satisfy the criteria for a special permit, the Salisbury zoning board was to advance both to the OOA.

II. Equity Will Not Suffer a Wrong Without a Remedy.

This Court need look no further than the cases under G.L. c. 40A, §17, to conclude the Land Court had authority both to temporarily enjoin the City Council from proceeding with related but distinct municipal

[1] In *Clear Channel*, the Appeals Court was concerned with the relation between local zoning and the state outdoor advertising regulations. This Court has also recognized the interconnectedness of adjacent regulatory schemes in the specific context of marijuana regulations affecting local zoning. *See West St. Assocs. LLC v. Planning Bd. of Mansfield*, 488 Mass. 319, 323 (2021) ("town's bylaw is preempted by State law to the extent it requires all medical marijuana dispensaries to be nonprofit organizations").

licensure, and to render a judgment requiring that hearings on the municipal license be held in a way to accommodate Bask. However, there is an even larger body of case law on the powers of equity courts (under §17, a zoning appeal court is a court of equity) to craft meaningful judgments that also supports the Land Court's action at issue here.

"A fundamental maxim of general equity jurisprudence is that equity will not suffer a wrong to be without a remedy." *Recinos v. Escobar*, 473 Mass. 734, 741 (2016). A court with equity jurisdiction, like the Land Court when hearing zoning appeals, has "broad and flexible powers to fashion remedies." *Id.* at 740–41. These powers "extend to actions necessary to afford any relief in the best interests of a person under their jurisdiction." *Id.* at 741. As the U.S. Supreme Court has opined:

> The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15 (1971).

By expressly granting courts hearing zoning appeals the ability to "make such other decree as justice and equity may require" (G.L. c. 40A, §17), the legislature has armed trial courts in zoning cases with the full arsenal of equitable remedies. This includes the ability to direct the conduct of municipal permitting authorities, and to enjoin municipal (and private) action.

III. Where the City Council Is the Licensing Authority and the Special Permit Granting Authority, it May Be Properly Enjoined under Either Role.

The Appellant argues that "no pleading in the case had sought licensing relief" as to the municipal permit, and that the Land court has no jurisdiction to hear appeals from the grant or denial of such municipal permits. The Single Justice apparently agreed. This reasoning misses the mark for three reasons: it ignores the fact that the Land Court never purported to review a decision on the municipal license, ignores the fact that the City Council is the same licensing authority for both permits, and misconstrues the ability of courts to exercise

jurisdiction over nonparties when necessary to afford complete relief.

A. The Land Court Did Not Purport to Review the Municipal License Process.

The Land Court was not seeking to review the City Council's decision on whether to grant Bask, or any other business, a license to operate a marijuana business under its general ordinances. Likewise, the Land Court did not purport to render any opinion on whether an applicant, including Bask, would or would not be entitled to such a municipal license. Rather, the Land Court simply sought to preserve the opportunity of Bask to participate in that process on an equal footing with others whose special permit applications had *not* been improperly denied. This relief was appropriate to an aggrieved special permit applicant, and did not require or enable the Land Court to review the merits of the municipal licensing decisions.

Moreover, it is no answer to say that because the Land Court would (arguably) *not* have had jurisdiction over a theoretical appeal from a denial of the municipal license, that it was without jurisdiction in

the zoning case to order the defendants not to proceed with awarding municipal licenses, without the successful special permit litigant, Bask, included. The Superior Court and the Land Court have concurrent jurisdiction over zoning appeals, which is conferred to each by the same statute. The Superior Court clearly would have jurisdiction over an appeal from a municipal license denial. *See Mederi, Inc. v. City of Salem*, 488 Mass. 60, 67 (2021)(certiorari review available for host community agreement decisions). The Single Justice's reasoning suggests that the Superior Court would be able to issue a judgment that the Land Court could not issue in the same type of case, under the same statute. That is not and cannot be the law.

Likewise, the mere fact that the Land Court is *generally* a trial court of limited subject matter jurisdiction should have no impact upon the overall scope of a Land Court judge's equitable jurisdiction pursuant to G.L. c. 40A, § 17. *See Judge Rotenberg Educ. Ctr., Inc. v. Comm'r of the Dep't of Mental Retardation*, 424 Mass. 430, 463 (1997) ("Probate Court is a court of limited jurisdiction, which pursuant to G.L. c. 215, §6, has general equity jurisdiction" and

as such "has broad and flexible powers to fashion remedies").

B. The Same Municipal Board Wears Two Permitting Hats.

To some extent, the case at bar is an easier case because there is only one board, the City Council, which is wearing two hats. They are at once the special permit granting authority and the marijuana retail licensing authority. The City Council should not be able to escape the reach of the Land Court by switching hats.

The Taunton City Council, and its members, were therefore within the jurisdiction of the Land Court under §17. *See Commonwealth v. Town of Hudson*, 315 Mass. 335, 348 (1943) ("Officers of a town or city may be required to do all acts within their power to cause the municipality to obey a decree against it, and may be punished for failure to do so"). As defendants in the zoning appeal, the City Council is in no position to complain that they were ordered to do something, or enjoined from doing something else, that would have the effect of undermining the judgment in that case.

C. Even Distinct Bodies of the Same Municipality Should Be Within the Jurisdiction of an Equity Court.

Even if the municipal license and the special permit were issued by distinct boards (for example, if the zoning board were the special permit granting authority and the city council the municipal licensing authority) it should not change the outcome. A judicial order "may be binding upon persons who, although not parties to a cause, participate or aid a party in disobeying an order." *Mohamad v. Kavlakian*, 69 Mass. App. Ct. 261, 264 (2007). "A person who was not a party to an action in which an order was entered may in certain circumstances be found to be in contempt of that order." *Bird v. Cap. Site Mgmt. Co.*, 423 Mass. 172, 178 (1996). *See* C*ommonwealth v. Hudson*, *supra* at 347 ("Any person ... though not a party to the cause, who counsels or aids a party in disobeying a decree, is himself punishable."). *See also* Mass. R. Civ. P. 65(d) (injunction binding on "parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order"); Mass. R. Civ. P. 71 ("when

obedience to an order may be lawfully enforced against a person who is not a party, he is liable to the same process for enforcing obedience to the order as if he were a party").

Here, where a municipality chooses to make a zoning permit a prerequisite to a non-zoning permit, the municipality subjects itself to the authority of a court hearing a zoning appeal to make such orders as are necessary to protect the interests of the prevailing party in the zoning appeal. If the Plaintiff here were able, under the local regulations, to proceed with its special permit application and its municipal license application on parallel tracks, there would be no danger of being "shut out" of the municipal permit, and no need for the relief granted by the Land Court. Having made the processes related, Taunton cannot credibly object to the consequence of tying the permitting together.

IV. Municipalities May Not Use General Police Powers to Thwart Limitations on their Zoning Power.

Both the preliminary injunction and the ultimate judgment issued by the Land Court in this case were designed to make sure that the City Council could not

use its municipal permitting process to do what it could not do under zoning, that is, arbitrarily and capriciously deny a special permit. *Newbury Junior College v. Town of Brookline*, 19 Mass. App. Ct. 197 (1985), presents a case where a trial judge hearing a certiorari appeal under G.L. c. 249, §4, along with a request for declaratory judgment, both concerning a denial of a boarding house license by the select board annulled the decision as violative of the so-called Dover Amendment, G.L. c. 40A, §3. *Id*. at 198.

This case did not involve a zoning appeal under G.L. c. 40A, §17. Nonetheless, a judge of the Land Court (sitting by special designation in the Superior Court) ordered the boarding house license to issue. *Newbury Junior College*, *supra*, at 198. Importantly, like the city of Taunton does with respect to marijuana businesses, Brookline subjected dormitories to multiple layers of local approvals. First, Brookline attempted to subject the dormitories to oppressive dimensional regulations, which were ruled violative of the Dover Amendment. *Id*. at 199. Then, Brookline attempted to prohibit the dormitories under a "master development plan approval procedure" that

was also held "subversive of the Dover Amendment." *Id.* at 199-200. Ultimately, the Appeals Court affirmed the trial court's ruling that "a town may not, through exercise of the licensing power, achieve by the back door a land use limitation which G.L. c. 40A, § 3, as appearing in St.1975, c. 808, § 3, expressly forbids as a zoning option." *Newbury Junior College, supra,* at 198. "A municipality 'cannot achieve indirectly that which it is forbidden to achieve directly.'" *Id.* quoting *Rogers v. Provincetown,* 384 Mass. 179, 182 (1981). *See also Mohamad v. Kavlakian*, *supra* at 265 ("judges will not allow a party to do indirectly what an order makes clear he cannot do directly").

V. The Land Court Has Authority to Ensure that Its Judgments Are Meaningful and Afford Complete Relief to the Successful Litigant.

Here, the Trial Judge had good reason to believe that absent intervention by the court, the Plaintiff would have been shut out of the municipal license process, and as a result, even if plaintiff prevailed in its zoning appeal, it would be a hollow victory. That is, even if the Land Court judgment annulled the special permit denial decision and ordered the special permit to be issued—both of which are remedies

available to any court hearing a zoning appeal——there was a risk that the judgment would come too late and be of no practical effect. Two permits were required: the special permit under zoning, and the non-zoning municipal license, and there are a limited number of licenses available. The City Council was both the special permit granting authority and the municipal licensing authority. The Land Court determined that the City Council wrongfully denied the special permit. If the Land Court could not order that the plaintiff be afforded an opportunity to obtain a municipal license, then the improper denial of the special permit could not be fully and properly remedied, and in a way, the City Council "gets away with it."

Courts can, and should, use equitable remedies against government officials "who have failed to abide by legal standards, commanding them to take affirmative action, often over a wide and sensitive range." *Perez v. Boston Housing Authy.*, 379 Mass. 703, 730 (1980). "It is true that injunctions going against public officials (elected or appointed) for violations of law, and especially injunctions that require the officials to take affirmative remedial steps, have

been resisted from time to time on the mixed grounds that they would have the effect of cancelling the discretion or latitude of action supposed to inhere in the offices held and would present awkward or difficult problems of enforcement. But it is now clear that such injunctions are not inhibited for those reasons alone." *Id.* at 729, citing *Commonwealth v. Hudson*, *supra* (municipal chlorination of water; violation of statutory obligation); *Blaney v. Commissioner of Correction*, 374 Mass. 337 (1978) (treatment of prisoners in "protective custody" status; violations of statutory standard); *Commonwealth v. Andover*, 378 Mass. 370 (1979) (municipal revaluation of properties for tax purposes; violations of both statutory and constitutional standards); *Amherst-Pelham Regional School Comm. v. Department of Educ.*, 376 Mass. 480, 494-495 (1978); *Board of Health of N. Adams v. Mayor of N. Adams*, 368 Mass. 554, 564-568 (1975). *See Judge Rotenberg Educ. Ctr.*, *supra* at 463 ("court with equity jurisdiction has broad and flexible powers to fashion remedies" and "[p]ublic officials who fail to abide by legal standards are not immune to such remedies") and cases

cited; *Good v. Commissioner of Correction*, 417 Mass. 329, 336-337, 337 n. 8 (1994); *Commonwealth v. Andover*, *supra* at 379 ("Municipalities that have not performed their statutory and constitutional duties should not expect a sympathetic judicial reception"); *Commonwealth v. Hudson*, *supra* at 345 ("A town is fully subject to the judicial power. Decrees in equity have often been made against towns. Courts have ordered towns as well as cities to perform affirmative acts").

In other words, that cities and towns generally have broad Home Rule police powers does not mean that they are allowed to exercise those powers in an unlawful manner, in particular, to obviate court judgments. And, it has long been the law, as handed down by this Court, that the Massachusetts judiciary possesses the power fully and completely to act as a check on such excesses.

VI. **Details of Injunctive Relief Are Left to Discretion of Trial Judge**.

Finally, the Amici take no position on the issue whether either the preliminary injunction or the Land Court's judgment were overbroad. Suffice to say that to debate whether the remedies were overbroad is to acknowledge the fundamental authority of the Land

Court to have made its decree in the first place. Overall, a trial judge is charged, when issuing injunctive relief against the government, to consider what is in the best interests of the public at large. *See Commonwealth v. Mass. CRINC*, 392 Mass. 79, 89 (1984), citing *Planned Parenthood League v. Bellotti*, 641 F.2d 1006 (1st Cir. 1981). Ultimately, that determination "generally rests within the sound discretion of the judge[.]" *T & D Video, Inc. v. City of Revere*, 423 Mass. 577, 580 (1996).[2]

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[2] Here, it is worth factoring that the City Council ignored and disobeyed the trial judge's injunction, and awarded all but one of the outstanding licenses. Therefore, even if, perhaps, it would have been better for the trial judge to have issued a more narrow injunction initially, to hold that a more narrowly-tailored injunction was required would reward disobedience to the courts and the rule of law. "Even if erroneous, a court order must be obeyed, and until it is reversed by orderly review, it is to be respected." *Mohamad v. Kavlakian*, *supra* at 263. As this Court opined in *Commonwealth v. Town of Hudson*, "[w]e do not ordinarily find it necessary to detail the measures that may be taken for the execution of a judgment or decree, or to point out the path that leads to the jail door. We commonly assume that municipalities and public officers will do their duty when disputed questions have been finally adjudicated and the rights and liabilities of the parties have been finally determined.... When a decree runs against a municipality, a subordinate agency of government, to which have been delegated certain lawmaking functions..., and which itself expects and may require obedience from individuals to its bylaws and

CONCLUSION

For the reasons discussed above, the Amici respectfully request that the court find that the Land Court, in a pending zoning appeal, has the authority to enjoin a municipal licensing authority as necessary to protect the interests of a plaintiff, and that, pursuant to G.L. c. 40A, §17, the Land Court, has the authority to order a municipal licensing authority to consider a particular license application at a particular licensing hearing to give meaning and effect to a decision in a zoning appeal and to protect the interests of the prevailing litigant.

Such a ruling is consistent with existing jurisprudence and furthers the interests of the public in ensuring that the scope of relief that may be granted pursuant to G.L. c. 40A, §17 is full and complete; that property owners or developers who suffer a wrong at the hands of a municipal board will not be left without remedy; and that when zoning appeals are taken to the Land Court (as opposed to the

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regulations, it may rightly be expected to set an example of obedience to law." 315 Mass. at 343.

Superior Court) that the Land Court has the full panoply of equitable remedies at its disposal.

Respectfully submitted

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CERTIFICATE OF COMPLIANCE WITH MASS. R. APP. P. 16(K)

I certify that the foregoing brief complies with all rules of court pertaining to the filing of briefs, including but not limited to, Mass. R. App. P. 16 and 20. This brief is composed of the monospaced font Courier New, 12-point type, and contains less than 35 non-excluded pages.

/s/ Shawn M. McCormack
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CERTIFICATE OF SERVICE

I, Shawn M. McCormack, counsel for the Real Estate Bar Association of Massachusetts, Inc., and The Abstract Club, hereby certify that I have made service of this Brief upon attorney of record for each party either by first-class mail, postage prepaid, or by the Electronic Filing System/e-mail as follows:

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